MOTION FILED
MAR 1 1979

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-432

BRIAN F. WEBER, Individually and on Behalf of all other persons similarly situated

Appellee

versus

KAISER ALUMINUM & CHEMICAL CORP. and UNITED STEELWORKERS OF AMERICA AFL-CIO

Appellants

BRIEF AMICUS CURIAE ON BEHALF OF THE UNITED STATES JUSTICE FOUNDATION

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By: Jack N. Rogers
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ORTLIEB PRESS BATON ROUGE

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Appellants

NOTICE OF MOTION

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PLEASE TAKE NOTICE that the undersigned have moved the Court for leave to submit a brief *amicus curiae*

on behalf of the United States Justice Foundation in support of judgment for appellee in the above captioned cause.

Very truly yours,

ROGERS & CONNELLY
Attorneys for Amicus Curiae
840 Commerce Building
Baton Rouge, Louisiana 70801

By _____
Jack N. Rogers

_____
Michael R. Connelly

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MOTION FOR LEAVE TO SUBMIT A BRIEF AMICUS CURIAE

The United States Justice Foundation hereby moves this Honorable Court to grant it leave to file a brief amicus curiae in support of judgment for the appellee in the above captioned action. There has been no consent by the parties to the filing of this brief.

The organization filing this brief is a newly formed public interest legal foundation receiving support from practicing attorneys throughout the United States. Its purpose is to provide legal counsel and support to individuals and organizations which are engaged in, or may become engaged in, litigation involving the protection of constitutional rights or other matters of grave public concern. The United States Justice Foundation and the members of the bar who are its members and directors feel that the statutes of the United States which

are designed to prevent discrimination in employment practices have in fact been used by certain governmental agencies and private corporations to foster discrimination.

The members of the United States Justice Foundation do not believe that current interpretations of these laws are adequate to prevent further discrimination against individuals by either governmental or private entities. The Justice Foundation is concerned that the briefs filed by appellee and appellants in this case will deal only with the narrow issue of affirmative action programs in the situation where there has been no history of previous discrimination by the sponsor of the program, in this case Kaiser Aluminum & Chemical Corporation.

Mover wishes to address itself in this brief not only to that question but also the broader issue of whether affirmative action programs in general are violating the constitutional rights of various members of the public.

Mover has a strong interest in and knowledge of the important issues raised here. Submission of mover's brief *amicus curiae* will be of substantial assistance to this Court, will not delay resolution of any of the issues raised in this case and will in no way prejudice the rights of any of the parties to this suit.

CONCLUSION

For the above stated reasons, the United States Justice Foundation herein requests that this Court grant its motion for leave to file a brief amicus curiae.

Dated: Baton Rouge, La.
February 20, 1979.

Respectfully submitted:

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Attorneys for Mover
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Baton Rouge, Louisiana 70801

By _____
Michael R. Connelly

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TABLE OF AUTHORITIES

Cases **Page**

Carter v. Gallagher, 452 F.2d 315 (1971) 6

Cox v. Allied Chemical Corp., Local 216, International Union of Operating Engineers AFL-CIO, 382 F.Supp. 309 (1974) 6

EEOC v. American Telephone & Telegraph, 419 F.Supp. 1022 (1976) 6

Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) 5

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 7

Hairston v. McLean Trucking Co., 520 F.2d 226 (1975) .. 5

International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) 6

Kutska v. California State College, Department of Education, 410 F.Supp. 48 (1976) 6

Paterson v. Newspaper and Mail Deliverer's Union of New York and Vicinity, 514 F.2d 767 (1975) 6

Quailes v. Philip Morris, Inc. 279 F.Supp. 505 (1968) 6

Rios v. Enterprise Association Steamfitters Local 638 of U.A., 501 F.2d 622 (1974) 7

University of California Regents v. Bakke, —— U.S. —— (1978) 5

U.S. v. International Brotherhood of Electrical Workers, Local 38, 428 F.2d 144 (1970) 7

U.S. v. Local 189 United Papermakers & Paperworkers, AFL-CIO, CLC, 282 F.Supp. 39 (1968) 5

U.S. v. United Brotherhood of Carpenters & Joiners of America Local 169, 457 F.2d 210 (1972) 7

U.S. v. Wood, Wire, and Metal Lathers International Union, Local 46, 471 F.2d 408 (1973) 7

STATUTES

14th Amendment U.S. Constitution 2

42 U.S.C. 2000(e)(2)(a) Sec. 707(a) 2

42 U.S.C. 2000(e)(2)(d) Sec. 703(d) 2

42 U.S.C. 2000(e)(2)(j) Sec. 703(j) 3

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

The interest of amicus appears from the foregoing motion.

INTRODUCTORY STATEMENT

This brief addresses itself to two questions. First, whether appellee is entitled to relief from the alleged discrimination by appellants and secondly, whether consistent with the Civil Rights Act of 1964 the Fourteenth Amendment to the United States Constitution affirmative action programs can be continued to remedy so-called past discriminations without themselves violating the Constitutional rights of citizens who had no part in the past discrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides in part

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person the equal protection of the laws."

The pertinent portions of the 1964 Civil Rights Act provide as follows:

Title VII (42 U.S.C. 2000(e)2(a) Section 703(a)

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000(e)2(d) Sec. 703(d)

> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Sec 703 (j), 42 U.S.C. 2000(e)(2)(j)

> (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of any imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

ARGUMENT

I. THE PREFERENTIAL SELECTION OF CANDIDATES FOR TRAINING PROGRAMS AT APPELLANT'S KAISER PLANT IN GRAMERCY, LOUISIANA ON THE BASIS OF RACE, VIOLATES THE 1964 CIVIL RIGHTS ACT SINCE THERE WAS NO HISTORY OF PAST DISCRIMINATION AGAINST MINORITIES.

The facts of this case have been well set out in the decisions of the lower courts and the briefs of the parties. In summary, the evidence clearly established that the appellee and members of the class he represents were denied access to certain training programs at the Kaiser Plant in Gramercy. In some cases they were denied the right to even apply for the on-the-job training programs since the programs were open only to minorities. In other cases appellee and members

of the class applied but were denied admittance to the programs despite the fact that they had greater seniority than the minority applicants selected. The sole criteria for this denial was race.

This "affirmative action" program resulted from a 1974 Labor Agreement entered into between Kaiser and the United Steelworkers of America. The relevant portions of that contract read as follows:

> "It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance Classifications in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio.
>
> "As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates."

The above cited portions of the labor agreement came about at least partially as a result of government pressure, as is reflected by the trial testimony. As the District Court determined, the Gramercy plant began implementing the program despite the fact that there was no history of racial discrimination at the plant. The goal was not to atone for past wrongs but to attempt to bring the percentage of minorities working in the various crafts in line with the percentage of minority workers in the surrounding communities. While this goal was perhaps a worthy one its direct result was a pattern of discrimination against Brian Weber and his fellow non-minority employees.

Appellants attempted to justify the program by claiming that it was a result of a collective bargaining agreement and

was in line with other affirmative action programs around the country. While it is true that the courts generally refrain from tampering with collective bargaining agreements they cannot be used to perpetuate unlawful acts such as racial discrimination.

In 1968 a District Court in Louisiana found that a seniority system was discriminatory against Negros. It rejected arguments that it could not tamper with in on the grounds that it perpetuated an illegal discrimination (*U.S. v. Local 189 United Papermakers & Paperworkers, AFL-CIO, CLC*, 282 F. Supp. 39) (E. D. La. 1968). In the case now before the court there was never any evidence presented that the seniority system of the Kaiser Plant at Gramercy was in any way discriminatory. Yet appellants themselves tampered with that system and interjected race as a criteria which in certain instances overrode the seniority system. In this instance the collective bargaining agreement established discriminatory practices for the first time at the Gramercy plant. Two 1975 cases specifically prohibit the use of collective bargaining agreements for such purposes. In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed. 12 (1975) the court noted that a union cannot lawfully bargain for the establishment or continuation of discriminatory practices. The 4th Circuit reached the same conclusion in *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975).

Appellants' contention that their program is in line with other affirmative action programs is also without merit. The justification for such programs is identifiable and illegal past discrimination. In its recent decision in *University of California Regents v. Bakke* —— U.S. ——, 57 L.Ed.2d 750, 98 S.Ct. —— (1978), this court discussed the employment discrimination in great depth. After examining some prior cases in which remedies were fashioned by courts to rectify past discrimination, the court concluded:

> "But we have never approved preferential classifications in the absence of proven constitutional or statutory violations."

This has consistently been the policy of the courts. In a 1971 case the 8th Circuit found that it had no authority to order discrimination against white firemen because there was a possibility that sometime in the past there had been discrimination against some unknown blacks. The court found no history of discrimination against the parties involved and therefore held it was prohibited by the 14th Amendment and the provisions of Title VII from imposing discrimination. *Carter v. Gallagher*, 452 F.2d. 315 (8th Cir. 1971) cert. denied 406 U.S. 950. Other courts reached the same conclusion. See *EEOC v. American Telephone & Telegraph*, 419 F.Supp. 1022, (Ed. Pa. 1976); *Patterson v. Newspaper and Mail Deliver's Union of New York and Vicinity*, 514 F.2d 767 (2nd Cir. 1975); *Cox v. Allied Chemical Corp, Local 216, International Union of Operating Engineers, AFL-CIO*, 382 F.Supp. 309 (M.D. La. 1974); *Kutska v. California State College, Department of Education*, 410 F.Supp. 48 (W.D. Pa. 1976) affirmed 549 F.2d. 795; *Quailes v. Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968).

In *Watkins v. United Steel Workers of America, Local 2369*, 516 F.2d 41 (1975 5th Cir.) the 5th Circuit held that even though there was a history of past discrimination, present hiring practices were nondiscrimatory and had been for over ten years. Therefore the court found no grounds for ordering affirmative action.

In the case now before this court there is no history of past discrimination and therefore no justification for imposing a quota system. Appellants have taken a lawful and reasonable seniority system for determining those entitled to enter training programs and made it unlawful by injecting *race* as a controlling criteria. See *International Brotherhood of Teamsters v. U.S.*, 97 S.Ct. 1843, 431 U.S. 324 (1977).

Nor is the fact that there is a racial imbalance at the plant a justification for discrimination. The 2nd Circuit pointed out that fact in *Rios v. Enterprise Association Steamfitters Local 638 of U. A.*, 501 F.2d 622 (2nd Cir. 1974) where it held that when a racial imbalance is unrelated to discrimination 703 (j) recognizes no justification for ordering that a preference be given to someone simply because they are in the racial minority.

This Honorable Court summed it up well when it held in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. (1971) that:

> "Discriminatory preference for any group, minority or majority is precisely and only that Congress has proscribed."

Appellee is therefore correct in his assertion that appellants are acting illegally in making race a criteria for on the job training.

II. AFFIRMATIVE ACTION PROGRAMS ARE INCONSISTENT WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT AND THE 1964 CIVIL RIGHTS ACT

The 1964 Civil Rights Act was adopted to provide relief to certain segments of the population who had suffered consistent discrimination on the basis of race or other factors. The concept of affirmative action evolved to provide specific remedies in those cases where the discrimination was identifiable as to certain individuals or groups of individuals in specific instances. The courts readily ordered affirmative action in those specific instances. *U.S. v. United Brotherhood of Carpenters & Joiners of America Local 169*, 458 F.2d 210 (7th Cir. 1972) cert. denied 409 U.S. 851; *U.S. v. Wood, Wire, and Metal Lathers International Union, Local 46*, 471 F.2d 408 (2nd Cir. 1972) cert. denied 413 U.S. 939; *U.S. v. Inter-*

national Brotherhood of Electrical Workers, Local 38, 428 F.2d 144 (6th Cir. 1970). However, in recent years the courts have taken less of that type of approach and affirmative action has generally taken place as a result of pressure from various Federal agencies. While the courts have begun to recognize the problems associated with affirmative action, Federal agencies have not. The type of problems were well articulated in this court's opinion in *University of California Regents v. Bakke*, supra.

> "Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of particular groups in order to advance the group's general interest. See United Jewish Organizations v. Carey, 430 U.S. 144, 172-173, 51 L.Ed.2d 229, 97 S.Ct. 966 (Brenna, J. concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth - - -. Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."

The final portion of that statement is particularly applicable to situations of employment discrimination. The vast majority of minority workers entering the work force today are not the victims of past discrimination. They have in fact, because of the Civil Rights Act of 1964, generally had access to the same opportunities as their peers in the majority. This has been true to a great extent for the last ten years.

There are therefore fewer victims of past discrimination in the work force. As a result, industry wide or even plant

wide affirmative action plans help few if any minority workers who have been discriminated against. On the other hand they harm many non-minority workers who had no part in any discrimination which may have occurred years ago.

The point is, affirmative action plans have outlived their usefulness and instead of being vehicles for rectifying past discrimination they have become vehicles for bureaucratic social engineering. The problem is aggravated by the fact that every government agency seems to have a different idea of what type of social engineering needs to be done.

The outcome is confusion among employers and labor unions and a developing pattern of discrimination which has adverse effects on both employees and employers as well as the economy as a whole. Amicus contends that it is time that this court end employment discrimination for good.

CONCLUSION

For the reasons stated above, amicua believes that the lower court judgment in favor of appellee should be affirmed.

Respectfully submitted:

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CERTIFICATE

I certify that a copy of the foregoing brief amicus curiae has been served on all parties by mailing same to the attorneys of record, Michael R. Fontham Esq., 1000 Whitney Bank Bldg., New Orleans, La. 70130, F. W. Middleton, Jr. Esquire, P. O. Box 2471, Baton Rouge, La. 70821, John C. Falkenberry Esquire, 409 North 21st Street, Birmingham, Alabama 35203, Jerry L. Gardner, Jr. Esquire, 1400 Richards Bldg., 837 Gravier Street, New Orleans, La. 70112, postage prepaid, this _____ day of February, 1979.

Michael R. Connelly